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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. IMPOSING THE BURDEN OF PROVING INCOMPETENCE TO STAND TRIAL UPON A DEFENDANT WHOSE COMPETENCE IS IN DOUBT VIOLATES DUE PROCESS OF LAW

A. Introduction

In the opening brief, petitioner demonstrated that imposing the ultimate burden of proving incompetence upon a criminal defendant, in a proceeding which is held only if the trial court has a "bona fide doubt" as to his or her competence, is inconsistent with due process of law under the Fourteenth Amendment. Only a finding—by the greater weight of the evidence—that a defendant is competent to stand trial will satisfy due process and ensure that the protection afforded by this Court's decisions in *Drope v. Missouri*, 420 U.S. 162 (1975), *Pate v. Robinson*, 383 U.S. 375, 385 (1966), and *Dusky v. United States*, 362 U.S. 402 (1960) is realized. ABA *Criminal Justice Mental Health Standards*, Standard 7-4.8(c)(ii) (1989 rev.).

Preliminarily, many of the arguments made by respondent and amici curiae in support of respondent confuse the considerations applicable to the initial burden of producing evidence of incompetence, in order to entitle the defendant to a hearing on the issue, with the considerations involved in the ultimate burden of persuasion once such a hearing has been found to be necessary. No jurisdiction requires that a hearing on the defendant's competence be held "on demand", *State v. Janice*, 20 Conn.App. 212, 565 A.2d 553, 554 (1989), nor does petitioner argue that such a rule is mandated by due process. Petitioner has no quarrel with the presumption of competence which obtains before a trial court declares a bona fide doubt as to the defendant's competence; but once that doubt has been declared, the analytical landscape changes dramatically. *See* Amicus Curiae Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York (CLP), Br. at 2-3, 18-24. The

due process analysis under *Mathews v. Eldridge*, 424 U.S. 315, 335 (1976) must focus on the situation presented at the time the competence determination is made, not on the situation before any prima facie case of incompetence has been found. We will turn to that analysis after disposing of three broad contentions made by the state.

B. Due Process Requires the State to Bear the Burden of Proof On Issues Other Than the Elements of a Criminal Offense

Respondent argues that "[t]he state only carries the burden of proof when it must prove the elements of a crime." Resp. Br. at 23 (citations omitted). This is patently incorrect: the state is constitutionally required to bear the burden of proof on a number of issues which do not involve elements of a criminal offense. *E.g., Colorado v. Connelly*, 479 U.S. 157, 167-169 (1986) (waiver of *Miranda* rights); *Lego v. Twomey*, 404 U.S. 477, 488 (1972) (voluntariness of defendant's statements); *United States v. Matlock*, 415 U.S. 164, 171-172 (1974) (voluntariness of a consent to search); *Nix v. Williams*, 467 U.S. 431, 444 n. 5 (1984) (inevitable discovery of illegally-seized evidence); *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (existence of factors in aggravation of sentence); *Chapman v. California*, 386 U.S. 18, 23-24 (1967) (state must prove harmlessness of constitutional error beyond a reasonable doubt).

These issues "have no necessary relationship to the elements of the crime," Resp. Br. at 20-21, but the Constitution nevertheless imposes the burden of proof on the state, as it does in a number of civil contexts in which an individual may be deprived of a fundamental liberty interest in the absence of any criminal sanction. *E.g., Addington v. Texas*, 441 U.S. 419 (1979) (civil commitment); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights). Constitutional values, even if they are unrelated to establishing the elements of a criminal offense, may require the state to bear the burden of proof on critical issues when it is necessary to protect

those values. *Lego v. Twomey, supra*, 404 U.S. at 486; *see United States v. Raddatz*, 447 U.S. 667, 678 (1980) (and cases cited therein). Respondent's argument finds no support in this Court's precedents.

C. The Due Process Analysis Is Not Controlled By Cases Dealing With Affirmative Defenses

Respondent and amici curiae argue that disposition of this issue is controlled by this Court's precedents permitting the burden of proof of affirmative defenses to be placed on the defendant. *E.g., Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Leland v. Oregon*, 343 U.S. 790 (1952). The substance of this argument ignores this Court's explicit recognition that the defendant's sanity at the time of the offense and competence at the time of trial are entirely distinct issues. *Jackson v. Indiana*, 406 U.S. 715, 739 (1972); *Drope v. Missouri, supra*, 420 U.S. at 176-177. Examination of the actual factors in issue in these two situations makes clear that the due process balance is not the same and respondent's argument assuming that they are equivalent is inaccurate.

The Solicitor General attempts to draw an analogy between the defendant's fundamental right not to be tried unless he is competent and the "compelling interest in not convicting persons who are insane" U.S. Br. at 20, in order to suggest that the constitutionality of placing the burden of proof on the defendant to establish the affirmative defense of insanity, upheld in *Leland v. Oregon*, should control the result here. The Solicitor General's treatment of the *Mathews* factors in this argument betrays a basic confusion as to the fundamental distinction between competence and the affirmative defense of insanity. A finding of incompetence generally results in only a temporary delay of criminal proceedings, and thus does not permanently affect the state's fundamental interest in prosecution. *Jackson v. Indiana, supra*, 406 U.S. at 738; *see below* at 10. By contrast, a finding of insanity results in complete exculpation for the criminal offense

and requires release of the defendant as soon as sanity is restored. Thus the stakes, with respect to the state's legitimate interests, are much higher in the sanity context.

The risk of error analysis is also different. Litigation of the affirmative defense of insanity presupposes a competent defendant, fully able to cooperate rationally with counsel in preparing and presenting evidence of a past mental state, and thus capable of "bear[ing] the laboring oar" on that issue. *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring). Litigation over competency, however, presupposes a defendant with a mental impairment, sufficient to establish a prima facie case of incompetence. That situation presents a significant danger that the defendant's disorder will interfere with his or her ability to demonstrate incompetence. In this case, for instance, Dr. Pierce thought that the defendant's difficulty in cooperating with counsel and his expert examiners was itself a product of his mental disorder. JA 61-67. Thus the ability of the parties to litigate the issue is significantly different in the two contexts.

Finally, the character of the defendant's interest is different. The defendant has a clear, fundamental right not to be tried if he or she is not competent. The character of a defendant's right to complete exculpation of a criminal offense is to some degree dependent upon the state's recognition, under its substantive criminal law, of affirmative defenses. *See Patterson v. New York*, *supra*, 432 U.S. at 207-210; *Mullaney v. Wilbur*, *supra*, 421 U.S. at 705-706 (Rehnquist, J., concurring). Thus a defendant's interest in establishing an affirmative defense, while admittedly strong, is not of the same unequivocal force as the interest in the fundamental fairness of the trial, to which the defendant's competence is a "condition precedent." *United States v. Muncaster*, 345 F.Supp. 970, 973 (M.D. Ala. 1972), *affirmed*, 472 F.2d 1407 (5th Cir.), *cert. denied*, 412 U.S. 963 (1973). Because of these

fundamental differences, the attempt of respondent and amicus curiae to conflate the distinct analyses of the issues cannot succeed. *See e.g., State v. Bertrand*, 123 N.H. 719, 465 A.2d 912, 916 (1983).

D. The Due Process Analysis Prescribed in *Mathews v. Eldridge* Applies To This Case

Respondent also contends that the general structure for due process analysis established in *Mathews v. Eldridge*, and applied in numerous other cases, should not be employed in this situation, Resp. Br. at 37; and amicus CJLF argues that it should not be used in criminal cases at all. CJLF Br. at 9-11. This Court has explicitly recognized that the *Mathews* test is the "general approach for testing challenged state procedures under a due process claim," *Parham v. J.R.*, 442 U.S. 584, 599 (1979), and the test has been employed, without dissent as to its applicability, in analyzing issues in criminal cases in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) and *United States v. Raddatz*, *supra*, 447 U.S. at 677.[1] The *Mathews* test establishes a structure for the rational analysis and application of the principles enunciated in earlier cases—the necessity for avoiding "hardship or oppression" or "injustice" to the accused in the placement of the burden of proof, *Morrison v. California*, 291 U.S. 82, 88-89, 96 (1934)—which is applicable to the issue of the imposition of the burden of proof on the defendant here. *See Speiser v. Randall*, 357 U.S. 513, 523 (1958) (applying due process test to imposition of burden of proof to show loyalty to government upon claimant of tax relief).

Respndent contends nevertheless that the appropriate analysis is the test of comparative convenience of access

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[1] *See also Burns v. United States*, 501 U.S. ——, 111 S.Ct. 2182, 115 L.Ed.2d 123, 139-140 (1991) (Souter, J., dissenting) ("The *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest, and . . . *Mathews* provides the right framework for the analysis [of the criminal sentencing issue] here as well.").

to evidence applied in *Morrison v. California*, 291 U.S. 82 (1934). This Court has recognized, however, that an analysis of the constitutionality of placing a burden of proof on a defendant because of the defendant's superior knowledge of the fact in issue, "which closely resembles the test of comparative convenience in the production of evidence, was implicitly disapproved in *Tot v. United States*, 319 U.S. 463 (1943)." *Leary v. United States*, 395 U.S. 6, 45 (1968). It is therefore doubtful whether the *Morrison* test, as such, retains constitutional validity. *See* Note, *The Burden of Proving Competence To Stand Trial: Due Process at the Limits of Adversarial Justice*, 45 Vand.L.Rev. 199, 223 (1992).

But even to the extent that the *Morrison* convenience test may be viewed as subsumed in the *Mathews* analysis —as part of the consideration of the cost of placing the burden of proof on the state—this Court's actual decision in *Morrison* supports petitioner. In *Morrison*, a state statute made possession of agricultural land by aliens illegal and placed the burden on the defendant to prove that he was not a member of a racial minority which rendered the defendant ineligible for citizenship. This Court reasoned that "[i]n the vast majority of cases" there would be no dispute because the race of the defendant would be obvious, and that "[t]he only situation in which the shifting of the burden can be of any substantial profit to the state" is when the question is a difficult one because the defendant is of mixed racial origin. The imposition of the burden of proof upon the defendant was therefore held impermissible under the due process clause, because the defendant might be unaware of his origins, and thus imposing the burden on him "may result in grave injustice in the only class of cases in which it will be of any practical importance." *Id.* at 96.

This Court's reasoning in *Morrison* finds an exact parallel in this situation. Petitioner has shown, and neither respondent nor amici curiae deny, that in the vast majority of cases no issue as to the defendant's competence

is ever raised, or, if it is raised, it is resolved without dispute. Pet. Br. at 30-31. It is only when the question of competence is a close and difficult one that the burden of proof assumes any importance at all. In those cases, the defendant, who must have been found to be of questionable competence in order to be entitled to a hearing in the first instance, is likely to be hampered in his ability to persuade the jury of his incompetence by the very mental impairment in issue. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 246 (1972); *United States v. Hemsi*, 901 F.2d 293, 295-296 (2d Cir. 1990) (defendant's disruptions of trial could not justify removal from courtroom if they were themselves the product of mental disease or defect); *Fitch v. Estelle*, 587 F.2d 773, 776 (5th Cir.), *cert. denied*, 444 U.S. 881 (1979) (questioning reliability of apparently incompetent defendant's own assertions as to capacity). Thus, just as in *Morrison*, imposing the burden of proof on the defendant "may result in grave injustice in the only class of cases in which it will be of any practical importance."

E. Application of the *Mathews v. Eldridge* Factors Requires the Conclusion That Imposing the Burden of Proof on the Defendant Violates Due Process

The *Mathews* test provides the appropriate framework for analysis of the issue presented here, and we therefore turn to consideration of the three factors—the individual's interest, the state's interest (including the cost of the additional safeguards proposed), and the risk of error in the proceeding—involved in that test.

The first factor of the *Mathews* test clearly weighs in favor of petitioner's position. Respondent concedes that a criminal defendant's interest in being tried only if he or she is competent is a fundamental one. Resp. Br. at 37 n. 7. This Court's precedents make it clear that the competence of the defendant is absolutely necessary to the fundamental fairness of a criminal trial, and therefore to the validity and reliability of any resulting conviction and sentence. Unlike a mere erroneous evidentiary rul-

ing or instruction, a defendant's incompetence infects the entire trial process. *Cf. Arizona v. Fulminante*, 499 U.S. ——, 111 S.Ct. 1246, 113 L.Ed.2d 302, 331 (1991). While an erroneous determination of competence may not absolutely ensure a conviction, it does seriously hamper the defendant's ability to provide necessary cooperation to counsel; and on strategic questions where the party must make a personal decision among available alternatives, a defendant who is not competent is likely to make an irrational choice which dooms his or her case,[2] and an erroneous determination certainly upsets the assumptions underlying other rules which bind criminal defendants. *See McCleskey v. Zant*, 499 U.S. ——, 111 S.Ct. 1454, 113 L.Ed.2d 517, 547-548 (1991) (procedural default for failure to raise issue in first federal habeas corpus petition justified in light of defendant's personal knowledge of facts giving rise to claim).

Amicus suggests that the strength of the defendant's fundamental interest in being tried only if he or she is competent is somehow diminished because an erroneous finding of incompetence results in the defendant's hospitalization and, possibly, treatment including involuntary medication. U.S. Br. at 24-26. This argument has no force here: petitioner was incarcerated prior to trial, and was receiving medication for his mental state prior to and during trial, and at no time did petitioner object to a finding of incompetence. RT 231-232, 678-685. In addition, California law provides for incompetence commitments to be made to the least restrictive setting appropriate, Cal. Pen. Code, § 1370, subd. (a)(1-3, 5) (West Supp. 1991); and involuntary medication is nowhere required as part of such a commitment. Moreover, incompetence commitments are normally very brief, *see below* at 10; and any imposition on a defendant's rights in this regard will be temporary and reversible, in contrast to the virtually permanent damage to a defendant's right to a fair trial and reliable sentence which results from an erroneous finding of competence.

[2] In this case, the defendant irrationally insisted upon reentry of a plea of not guilty by reason of insanity, despite warnings from counsel and the trial court that, strategically, proceeding with a trial of sanity would "destroy" the penalty phase presentation. RT 5991, 5995-6003. Since the defendant did not suggest any rationale for insisting on reentering the plea after he had withdrawn it, and there is no indication that the defendant was deliberately seeking a death sentence, it is highly likely that the decision directly resulted from an erroneous determination that he was competent. *See United States v. Hemsi, supra*, 901 F.2d at 295-296 (counsel's recognition that defendant would not be able to make "judgment calls" in case supported finding of incompetence).

The second *Mathews* factor, the risk of an erroneous determination, is significant. The determination of competence is largely dependent upon psychiatric and psychological expert testimony and is therefore fraught with potential for error, as this Court has repeatedly recognized. *E.g., Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). Petitioner has also identified other specific factors increasing the risk of error: the complexity of the competence determination; the effect of the defendant's mental impairment itself upon his or her ability to cooperate and assist in demonstrating his or her own capacity; the reflexive official suspicion of claims of incompetence; and the injection into the jury's deliberations of an irrational instruction to presume that the defendant is competent, despite the fact that a competence hearing is held only after a prima facie showing of the defendant's incompetence has been found. With the exception of its argument as to the presumption instruction, respondent does not dispute petitioner's contentions on this point.[3]

[3] Amicus curiae suggests the possibility that defendants facing severe sentences may claim incompetence to avoid trial, and thus that suspicion toward such claims does not deform the competence determination. U.S. Br. at 23 n.19. The expert testimony in this case, however, indicated no correlation between the seriousness of the charged offense and the incidence of malingering. JA 65-66. Further, the primary defense against false claims of incompetence is the initial stage at which the trial court must find a bona fide doubt as to the defendant's competence. There is no logical correlation between the ultimate burden of persuasion on the issue of

The third *Mathews* factor, the state's interest, is clearly less compelling than the defendant's. While the state has, of course, a strong interest in prosecuting criminal offenses, it has no legitimate interest in trying a defendant who is not competent. The increase in the accuracy and reliability of the determination which would result from requiring that competence be demonstrated by the greater weight of the evidence would therefore inure to the benefit of the state as well. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (state shares interest in accurate and just decision in termination of parental rights).

Further, any interference with the state's interest in trying the defendant which results from a finding of incompetence is necessarily limited. Under *Jackson v. Indiana*, *supra*, 406 U.S. 715, the state is constitutionally prohibited from holding the defendant longer than is necessary to restore competence or determine if he will regain competence in the reasonably foreseeable future. *See* Cal. Pen. Code, § 1370, subd. (a)(2), (b)(1-2), (c)(1) (West Supp. 1991) (limiting total duration of incompetence commitment and providing for evaluation reports within 15 days after commitment and regularly thereafter). Moreover, as petitioner explained in the opening brief, in practice the duration of incompetence commitments is very short. Pet. Br. at 33-35. Neither respondent, nor amici curiae in support of respondent, questions or disputes the information cited by petitioner that the overwhelming majority of individuals committed as incompetent are returned for trial quickly.

The other component of the state's interest is the cost of the additional safeguard. Neither respondent nor amici curiae identifies any concrete evidence that placing the burden of proof on the state would cause any increased cost or dislocation of any sort.[4] Nor does respond-

competence and the number of cases in which a hearing on the issue of competence is found to be necessary.

[4] Numerous states allocate the burden to the prosecution, but there is nothing to suggest that the experience of these states demon-

ent discuss the factors cited by petitioner which demonstrate that the prosecution has ample access to evidence of the defendant's condition, specifically the greater access to, and opportunity for observation of, an in-custody defendant by the prosecution, the equal availability of the expert opinions on the issue, or the equal availability of evidence from third parties. Pet. Br. at 32.

Instead, respondent focuses almost entirely upon defense counsel's supposedly greater knowledge of the defendant's mental condition. Whatever force this argument may have at the stage of the initial burden of production, when defense counsel may be the first to realize that the defendant cannot participate rationally in the proceedings, it has none once a doubt as to competence has been declared and evidence must be adduced at a hearing.[5] The primary evidence of the character and extent of the defendant's mental disorder are the expert reports, which are as available to the prosecutor as to defense counsel. Further, any information defense counsel has as to the defendant's ability to communicate or to participate in the proceedings to the extent required by *Drope*, *Pate*, and *Dusky* is also as available to the

strates an untoward cost from that rule. *See Santosky v. Kramer*, *supra*, 455 U.S. at 767 (no evidence of effect on "speed, form, or cost" of proceedings in states adopting clear and convincing evidence standard for termination of parental rights); *United States v. Turner*, 602 F.Supp. 1295, 1313 (S.D.N.Y. 1985) (finding government proved defendant's competence by preponderance of evidence).

[5] Respondent's insistence that defense counsel has a monopoly upon access to information relevant to the defendant's competence is also inconsistent with the actual practices of courts. At the initial stage of producing evidence of incompetence, in order to justify a competence hearing, defense counsel may be the first to recognize the defendant's incapacity. Courts often deny competence hearings, however, in the face of positive assertions by counsel that the defendant is incapable of proceeding. *E.g.*, *People v. Stewart*, 89 Cal. App.3d 992, 996-997, 153 Cal.Rptr. 242 (1979); *United States ex rel. Foster v. DeRobertis*, 714 F.2d 1007, 1011-1012 (7th Cir. 1984).

prosecutor as to defense counsel, since that evidence is not shielded by any privilege. *Darrow v. Gunn*, 594 F.2d 767, 774 (9th Cir. 1974); *United States v. Kendrick*, 331 F.2d 110, 114 (4th Cir. 1964).[6] Once a bona fide doubt as to competence has arisen, the court has the obligation to resolve the issue, which includes the power to compel psychiatric examinations and the cooperation of defense counsel in the inquiry. *E.g., Estelle v. Smith*, 451 U.S. 454, 465, 468-469 (1979); *see CLP Br.* at 14-15.[7]

Accurate analysis of the relevant factors in the *Mathews* test thus leads to the conclusion that the burden of proof of incompetence cannot constitutionally be imposed upon the defendant. This conclusion is consistent with the evidence of historical practice on this issue.

F. The Historical Evidence Is Consistent With Petitioner's Position

Amici curiae supporting respondent devote considerable argument to the issue of the British practice at the time the Constitution was adopted. As petitioner has acknowledged, the placement of the burden of proof at that period

[6] In this case, for instance, the defense investigator testified about his contacts with the defendant, JA 82-84, and defense counsel gave the court and the prosecution information about the defendant's statements following one of his outbursts during the competence hearing. RT 730, 736; *see also* RT 699. Nothing in the record suggests that the prosecution in this case had any difficulty obtaining evidence about the defendant. In fact, at trial some of the most significant evidence introduced by the prosecution was obtained from a member of petitioner's family. RT 5176, 5214-5217.

[7] The cases cited by respondent on this issue, *United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975), and *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), cert. denied, 408 U.S. 927 (1972), in fact illustrate petitioner's point. In both of those cases, the court indicated that defense counsel's testimony was or would have been probative on the issue of competence, and it was considered accessible to the trial court in its resolution of the competence issue. This is inconsistent with the theory that only the defense has adequate access to the crucial evidence on the question.

is not absolutely clear; but what is clear is that there was no such unequivocal historical support for placing the burden of proving incompetence upon the defendant as existed at common law for the burden of proving affirmative defenses. *Cf. Patterson v. New York*, 432 U.S. 197, 202 (1977); *Leland v. Oregon*, 343 U.S. 790, 798 (1952). Thus it cannot be argued that petitioner's due process claim is so at odds with traditional practice that it carries an additional burden of justification. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 121-130 (1989) (plurality opn.).

Moreover, contrary to the contentions of amici, the early case law in fact supports petitioner's argument. The case closest in time to the adoption of the Constitution on the specific issue held that, once the question of competence was placed in issue, the prosecution bore the burden of proving capacity to stand trial. *Ley's Case*, 1 Lewin 239, 168 Eng.R. 1026 (1828). In a case dealing with muteness, immediately prior to the adoption of the Constitution, the burden was placed upon the prosecution to establish capacity to stand trial, once it was determined that the defendant was mute due to a physical condition and not merely recalcitrant. *The King v. Steel*, 1 Leach 451, 168 Eng.R. 328 (1787). This is analogous to the current procedure, under which a bona fide doubt as to the defendant's competence, based upon a mental disorder, must be declared before the issue of the defendant's competence is tried, and it was the view accepted in the earliest federal cases on the subject. *United States v. Chisolm*, 149 F. 284, 289-290 (S.D. Ala. 1906); *see United States v. Lancaster*, 7 Bissel's Rpts. 440, 444, 26 Fed. Cas. 852, 854 (C.C.N.D. Ill. 1877).[8]

[8] The relevance of the historical record is limited by the fact that questions such as burden of proof and shifting burdens of persuasion—as well as critical distinctions between the burden of production and the burden of persuasion—were not typically made by courts and commentators of the eighteenth and early nineteenth century. At that period, jury instructions on the law were deemed merely advisory, as the jury was thought to have ultimate power to

G. The Weight of Current Authority Supports Petitioner's Position That Placing the Burden of Proof on the Defendant Is Constitutionally Impermissible

Petitioner's position is also in accord with well-reasoned current practice among the states, as reflected in the decisions analyzing the issue. Despite the fact that the issue of sanity at the time of the offense and competence at the time of trial are distinct questions, every court decision which has rejected the consitutional argument presented here has done so on the basis of the false equivalency of the two issues.[9] By contrast, every decision which has avoided the trap of confusing the two distinct issues has

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decide both the law and the facts, Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Column. L. Rev. 1369, 1429 n.258 (1991), citing, *e.g.*, Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 590-596 (1939); *compare Sparf v. United States*, 156 U.S. 51 (1895), *with id.* at 110 (Gray, J., dissenting); "and thus, the jury itself determined the proper standard of persuasion." Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L.Rev. 507, 524 (1975) (fn. omitted). Another major barrier to development of uniform rules as to burden of persuasion was the extremely limited availability of appellate review of convictions. "The inability to appeal a conviction based upon the use of an allegedly erroneous standard of persuasion prevented appellate courts from even considering what the proper standard should have been." *Id.* at 527.

Moreover, historical evidence suggests that the English practice of placing the burden of proving defenses on the defendant came from a misunderstanding of the issue of burden of persuasion. The Blackstonian rule on the issue resulted from a confusion of the burden of persuasion and the burden of production; and the American adoption of that rule—by Chief Justice Shaw in *Commonwealth v. York*, 50 Mass. (9 Metc.) 93 (1845)—similarly failed to confront the critical distinction between burdens of persuasion and production, an error which "continues to affect the course of American law." Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 902-910 (1968).

[9] *Lowenfield v. Phelps*, 817 F.2d 285, 294 (5th Cir. 1987), *affirmed on unrelated grounds*, 484 U.S. 231 (1988); *Wallace v. State*, 248 Ga. 255, 282 S.E. 2d 325, 330, *cert. denied*, 453 U.S. 927 (1981); *State v. Aumann*, 265 N.W.2d 316, 319-320 (Iowa 1978).

ruled in favor of petitioner's position.[10] Thus the weight of reasoned authority among state jurisdictions—authority which takes seriously this Court's recognition of the distinctions between sanity and competence, and which applies this Court's due process precedents with a regard for the specific situation involved—supports petitioner's argument.[11]

H. The Error In Imposing the Burden of Proving Incompetence Upon Petitioner Cannot Be Considered Harmless

Respondent finally claims that any error in instructing the jury on the burden of proof was harmless beyond a

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[10] *E.g., United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1978); *People v. McCullum*, 66 Ill.2d 306, 362 N.E.2d 307 (1977); *State v. Bertrand, supra*, 465 A.2d 912; *State v. Jones*, 406 N.W.2d 366, 370 (S.D. 1987); *see United States v. Makris*, 535 F.2d 899, 905-906 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

[11] Amici curiae refer to the enactment of the current federal statute, which requires a finding of incompetence by a preponderance of the evidence, 18 U.S.C. § 4241(d), as evidence that placing the burden of proving incompetence on the defendant complies with due process. CJLF Br. at 16-17; U.S. Br. at 10-11. Years before this enactment, however, every federal court which had reached the question held that imposition of the burden of proving incompetence upon the defendant was impermissible as a matter of due process of law. *E.g., United States v. DiGilio, supra*, 538 F.2d at 988 (3d Cir. 1976); *United States v. Makris, supra*, 535 F.2d at 906. The legislative history of the federal statute cited by amici does not contain a single reference to these authorities and devotes no analysis at all to the burden of proof question. S. Rep. No. 225, 98th Cong., 1st Sess. at 236, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3418. Rather, the legislative history and the statute as a whole focus upon the defense of insanity: the statute itself is included in the "Insanity Defense Reform Act"; and the legislative history stating the need for the enactment is concerned entirely with the insanity defense. S. Rep. No. 225, 98th Cong., 1st Sess. at 191-192, reprinted in 1984 U.S. Code Cong. & Admin. News at 3404-3405. Thus the federal statute on this issue suffers from the same confusion between the affirmative defense of insanity and the competence of the defendant at trial which infects all of the judicial authorities which reject petitioner's position. Pizzi, *Competence to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U.Chi.L.Rev. 21, 37-38 (1977).

reasonable doubt. Resp. Br. at 43-44. The California Supreme Court did not reach the issue of prejudice, JA 100-101, and the normal procedure would be to remand the case for that determination. *E.g., Yates v. Evatt*, 500 U.S. ——, 111 S.Ct. 1884, 114 L.Ed.2d 432, 451 (1911). Under the circumstances presented here, the only possible conclusion is that the error in imposing the burden of proof on the defendant was prejudicial, and this Court cannot dispose of the case on the ground that any error was harmless. *See Rogers v. Richmond*, 365 U.S. 534, 546-547 (1961).

There can be no dispute that the expert opinions of the defendant's competence were sharply divided. Dr. Gold was convinced that the defendant was incompetent. JA 22, 27-29, 30.[12] Dr. Sharma believed that the defendant was competent, although he acknowledged that an expert with Dr. Gold's experience with the defendant was in a better position to form an opinion. JA 55. While Dr. Pierce's opinion was that the defendant was competent, despite his paranoid schizophrenia, Pierce's testimony was that the defendant could and would assist counsel only to the extent he was able, JA 68; and his apparent lapses of attention (which were consistent with his having hallucinations), JA 53-55, 61-62, 71, were also consistent with a finding of incompetence. *See United States v. Hemsi, supra*, 901 F.2d at 295. The lay testimony was also divided. JA 11-14, 15, 77, 79-80, 83 . In addition, the jury was instructed on the burden of proof twice, during voir dire and before deliberations, JA 4-5, 86-87, and the prosecutor strongly emphasized the burden of proof both during voir dire of the jurors and in closing argument, JA 5-6, 85-86.

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[12] Respondent attacks Dr. Gold's opinion because he did not base it upon the facts of the charged offenses. Resp. Br. at 43. Here again, respondent confuses mental state at the time of the offense with competence at the time of trial, which are quite distinct inquiries. *Drope v. Missouri, supra*, 420 U.S. at 176-177; *see People v. Grant*, 45 Cal.3d 829, 755 P.2d 894, 912 (1988) (facts of offense did not give rise to doubt as to competence at trial).

In close cases the placement of the burden of proof is often outcome-determinative. *E.g., United States ex rel. S.E.C. v. Billingsley*, 766 F.2d 1015, 1023 (7th Cir. 1985); *United States v. DiGilio, supra*, 532 F.2d at 988-989; *see*, Underwood, *The Thumb On the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1308 (1977). This Court has also recognized that emphasis upon an error by the prosecutor in argument exacerbates its prejudicial effect. *Chapman v. California*, 386 U.S. 18, 25-26 (1967). Under these circumstances, there can be no rational argument that the constitutional error in imposing the burden of proof on the defendant could be found, beyond a reasonable doubt, not to have contributed to the verdict. *Id.*; *United States ex rel. S.E.C. v. Billingsley, supra*, 766 F.2d at 1247-1248.

I. Conclusion

The practical effect of the current imposition of the burden of proof of incompetence on the defendant is aptly stated in the amicus curiae brief of CJLF: "The effect of California's rule is to draw the circle around the defendants classified as 'incompetent' with a slightly smaller radius than is used in some other jurisdictions. A few defendants who would otherwise be considered marginally incompetent will instead be considered marginally competent." CJLF Br. at 16. It is precisely because the rule significantly increases the danger that incompetent defendants will "instead be considered marginally competent," and therefore be unconstitutionally subjected to trial, that the imposition of the burden of proof on the defendant is constitutionally unacceptable.

The integrity of the criminal process and the reliability of any resulting conviction and sentence depend upon the presence of a competent defendant at trial. Once a doubt has been found as to the defendant's competence, due process requires that the state make an affirmative showing, by the greater weight of the evidence, that the defendant is capable of standing trial. *See* ABA *Criminal*

Justice Mental Health Standards, Standard 7-4.8(c)(ii). Because petitioner's jury was not required to make an affirmative finding that he was competent, the judgment must be reversed.

II. THE INSTRUCTION IMPOSING AN IRRATIONAL PRESUMPTION OF COMPETENCE IN THE JURY'S DELIBERATIONS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

In the opening brief, petitioner showed that the instruction admonishing the jury that the defendant is presumed to be competent, in addition to the instruction placing the burden of proof of incompetence on the defendant, is irrational in the context of the competency proceeding.[13] The trial court's declaration of a doubt as to the defendant's competency implies a prima facie showing of incompetence, *People v. Samuel*, 29 Cal.3d 489, 495-496, 629 P.2d 485 (1981); and in the litigation of the issue the defendant is treated, as a result of that declaration of doubt, as if he is incompetent. Thus the

[13] Respondent contends that this argument is not properly before the Court. Resp. Br. at 44-45; U.S. Br. at 26-27. Contrary to respondent's assertion, the irrationality of the presumption instruction was raised below and was explicitly addressed in the decision of the California Supreme Court. JA 100. In the petition for certiorari, petitioner asserted the irrationality of the presumption, in light of the state's treatment of the defendant as incompetent in the context of the competency proceeding. Pet. Cert. at i, 13. This issue is therefore "fairly included" within the question upon which the court granted certiorari. Sup. Ct. Rule 24.1(a); *see, e.g., Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, § 6.25 at 358-361 (6th ed. 1986) (and cases cited therein). The situation in no way resembles those in the cases cited by respondent and the United States. *Heath v. Alabama*, 474 U.S. 82, 85, 87 (1985) (issue of jurisdiction of state court not included in grant of certiorari on double jeopardy and dual sovereignty issues); *Tison v. Arizona*, 481 U.S. 137, 146 n.2 (1987) (issue of state's overbroad construction of statutory aggravating factors not included in grant of certiorari on issue whether death penalty could be imposed on defendant who did not commit or intend killing).

instruction that the defendant is presumed to be competent is entirely irrational, in light of the state's actual treatment of the defendant. That instruction, in combination with the instruction imposing the burden of proof on the defendant, is likely to have a "significant additional" effect upon the jury. *See Taylor v. Kentucky*, 436 U.S. 478, 483 n. 12 (1978). Such an instruction may be considered by the jury as evidence, and result in the jury requiring a greater showing than is, or can be, imposed by instructions on the burden of proof. *E.g., Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642-644 (1929).

Respondent argues that the presumption instruction is merely a restatement of the burden of proof. Respondent does not analyze the decision in *Taylor*, which indicates that such an instruction increases the force of the burden of proof. Nor does respondent discuss the decision in *Henderson*, which indicates that a jury may view the presumption as evidence supporting the party in whose favor the presumption operates. The United States, as amicus curiae, argues that there is no "reasonable likelihood" that the jury would understand the presumption instruction as petitioner suggests. *Boyde v. California*, 494 U.S. 370 (1990). Amicus does not, however, discuss *Taylor* or *Henderson* any more than respondent does, and nothing in *Boyde* or its progeny suggests that the principles enunciated in those cases have been altered; in fact, both *Taylor* and *Henderson* are based upon the likely effect of presumption instructions.

The failure of respondent and of amicus supporting respondent to come to grips with these cases is a virtual concession that they cannot be distinguished. Petitioner relies upon the authorities cited in the opening brief and submits that the instruction injecting this irrational, evidentiary presumption of competence into the jury's deliberations violated petitioner's right to due process of law under the Fourteenth Amendment.

CONCLUSION

For the reasons stated here and in petitioner's opening brief, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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